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Supreme Court of the United States

October Term, 1970

No. 1098

GARFIELD & CO.,

Petitioner,

against

FRANCIS J. WIEST,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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Preliminary Statement

Petitioner has at page 2 of its petition substantially changed the issue from that presented in its brief to the Circuit Court (pp. 3-5, Appellant's Brief). In its attempt to becloud the simple issue before the District Court, the Circuit Court and now this Court, petitioner has resorted to quoting unsubstantiated statements from a popular news magazine obviously only a part of the news article and an excerpt of a long speech. The statement at page 9 of the petition is completely irrelevant to the issue at bar. Petitioner has gone outside the record in the Courts below. Such procedure should not be tolerated.

Petitioner has also attempted to raise the question of alleged waiver in a context not germane to the facts of this case.

The sole question here is as it has been in the Courts below:

Can petitioner, a member firm of the New York Stock Exchange with full knowledge of the workings of the New York Stock Exchange and of possible dealings, in the nature of such an Exchange, between arbitrators or their firms on the one hand, and *both* of the parties hereto on the other; take no steps in any tribunal to document its claim of possible bias or attempt to disqualify the arbitrators by application to any Court prior to or during extended hearings; participate in such hearings over a period of eight months; wait until it has lost in the arbitration proceeding and then attempt to have the Courts set aside the award upon the basis of unsubstantiated allegations of possible fraud and prejudice?

Facts

The judgment upon which petitioner seeks review, is bottomed upon an award after arbitration before a Panel of the New York Stock Exchange. The arbitration was held pursuant to the provisions of the Constitution and Rules of the Exchange by which both petitioner and respondent as members of the Exchange had agreed to abide *as well* as upon the written agreement of the parties (3a, 13a).

Petitioner initially moved to vacate the award upon the alleged ground of "undue means" or "evident partiality" (2a).

Not one scintilla of proof of such alleged prejudice was shown by petitioner, who relied in the Courts below, as it does in this application upon innuendoes and vague generalities (6a, R29a).

The names and firm connections of the Panel of Arbitrators were a matter of public record and were well known to petitioner (R6a, R9a, R28a).

After the parties had filed their respective statements of claim, answer and counterclaim, both signed a submission agreement (14a, R30a-36a). Thereafter, and during the last week of February 1968 notice was sent to both parties setting a hearing for March 7th, 1968 (15a). The pamphlet accompanying the notice and received by the parties specifically provided that either party might challenge any arbitrator by written notice to the Arbitration Director. At no time was any such challenge directed to the Arbitration Director (14a, 15a).

At the hearing on March 7th, 1968 petitioner for the first time requested the Arbitrators to in effect, disqualify themselves alleging the size of respondent's firm the fact that the arbitrators did business on the Exchange with respondent's firm and that one of respondent's partners had *at some unnamed time in the past* been a chairman of the Exchange's Board of Governors (5a). The application was denied (6a, 15a). Upon such denial petitioner without further protest or an application to any Court for a stay or for disqualification of the arbitrators proceeded with the arbitration (10a, 15a) from March 7th, 1968 through November 20th, 1968, a period of some eight months. On the latter date the hearings were closed and decision was reserved.

The issue before the arbitrators, on respondent's claim was simple: i.e. whether respondent was entitled to share in the increase in value of his membership and whether he was entitled to have his profits and losses allocated. This was the classic case that constantly comes before the Exchange Arbitration Panels (Respondent's Brief p. 4). It is interesting that on March 7th, 1968 counsel for Wiest

offered to permit petitioner to *withdraw his alleged counterclaim* and proceed thereon in a Court of Law, if so advised, but petitioner did not accept said offer (R23a, R24a).

On December 19th, 1968 a decision was handed down in favor of respondent.* No attempt had been made during this long period of time to withdraw from the arbitration proceeding or to make any application to any State or Federal Court to stay the same or to disqualify the arbitrators for any reason whatsoever. After petitioner found that its defense had been unsuccessful it moved in the District Court to vacate the award alleging the same reasons and the same generalities and innuendoes of bias it had brought up on March 7th, 1968.

By the very nature of the securities business and the membership of individuals and firms who comprise the New York Stock Exchange all members thereof must trade one with the other. This includes petitioner, a member firm of the Exchange, as well as respondent (R22a, R29a, R18a). Petitioner has been a member firm of the New York Stock Exchange since 1950 (R28a). Nowhere in its presentations to the District Court, the Circuit Court or in this Court has petitioner denied respondent's claim, in respect of either of the foregoing. At no time has there been any proof of the slightest bias or prejudice, upon the part of the arbitrators; petitioner relying only upon innuendoes and vague generalties.

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* Although petitioner at page 5 of the petition speaks of a divided vote by the arbitrators there is nothing in the record to show that there was actually a divided vote (R5 respondent's brief, R25a, 26a).

POINT I

The decision of the Circuit Court and of the District Court do not nullify the holding in *Commonwealth Coatings*.

The decision in *Commonwealth Coatings v. Continental Cas. Co.*, 393 U. S. 145 was decided upon the basis of six affirmative and three negative votes.

It involved a situation far different from the case at bar. It dealt with the so-called impartial arbitrator of three arbitrators, one chosen by each side and the third chosen by these two. The third or so-called impartial arbitrator not only failed to disclose that one of the parties had been a regular customer of his *but in addition had been involved in the very projects covered in the arbitration* (opinion of Mr. Justice Black).

Further, the information concerning this so-called impartial arbitrator was unknown to Commonwealth and was not revealed to it by the arbitrator, by the contractor or by anyone else until after the award had been made (R54a).

The concurring opinion of Mr. Justice White in which Mr. Justice Marshall joined, specifically stated that the *decision did not mean that the arbitrators are automatically disqualified by business relationships with the parties, if both parties are informed of the relationship in advance.* Petitioner cannot in the case at bar, deny its knowledge that all of the members of the Exchange necessarily traded one with the other, as well as with the firm of Spear, Leeds & Kellogg of which respondent had become a member. It raised that point at the initial hearing.

Nor can petitioner deny, that Mr. Justice White's statement that he could

> "* * * see no reason * * * to disqualify the best informed and most capable potential arbitrators"

applies with ultimate force to an arbitration between members of the New York Stock Exchange before a Panel of such Exchange.

The statement in the dissenting opinion in which Mr. Justice Harlan and Mr. Justice Stewart joined, wherein Mr. Justice Fortas adopted the finding of the First Circuit Court of Appeals

> "* * * that plaintiff's objections represent a situation where the losing party to an arbitration is now clutching at straws, in an attempt to avoid the results of the arbitration to which it became a party",

is very relevant to the fact situation in this case.

As Judge McGohey in his opinion in the District Court stated

> "The petitioner, although sufficiently informed to be able to do so, chose, for its own reasons not to make any challenge. Now that it has lost in the arbitration, it should not be heard to claim that the arbitrators' conduct denied it the opportunity to make what we find to be a free and informed choice" (10a).

POINT II

There has been no subordination of the relevant statute to the provisions of the Constitution and rules of the Exchange or to the agreement between the parties.

The relevant statute in Section 10 of Title 9 U. S. C. which permits vacating an award

> "b when there was evident partiality or corruption in the arbitrators or either of them"

Certainly, no such partiality or corruption has been shown. The statement of Judge Augustus N. Hand in *Carpineto v. Kiefer*, 187 F. 2d 32 (CCA 2d NY) (p. 10, Respondent's Brief) holding that for an award to be set aside the "corruption, fraud, or undue means" must be "made abundantly clear" is pertinent to the facts herein.

In *L. N. Jackson v. Compania Consolida*, 282 App. Div. 125, 121 N. Y. Supp. 2nd 624 (App. Div. New York Supreme Court First Department 1953), one of the parties had been a member of the New York Produce Exchange. An arbitration before a Panel of that Exchange had been had. The unsuccessful party then raised the question that the President of the unsuccessful claimant was a member of the Board of Governors of the Produce Exchange and that the Board of Governors had selected the Panel of Arbitrators. The Court in refusing to set aside the award pointed out, that the fact, that the claimant was a member of the Exchange had not been concealed, and that earlier contracts between the parties had provided for arbitration by the same Board. It stated that if there had been a false statement or a concealment there might have been a different situation.

The New York State Court of Appeals in the landmark case of *Astoria Medical Group v. Health Insurance Plan*, 11 N. Y. 2nd 128, per Judge Fuld, stated that the parties to an arbitration agreement are completely free to agree upon the identity of the arbitrators and the manner in which they are to be chosen, and that a known interest did not necessarily disqualify the arbitrators if they were chosen because of a particular relationship to the subject matter of a controversy. The Court stated that there must be *some showing* of something *overt* or some *real misconduct* on the part of an arbitrator before an award would be set aside.

In *Sea Coarle Opera Co. v. Conley*, 72 Fed. Supp. 825, affd. 63 F. 2d 310 (D. C. N. Y. and CCA N. Y.), the attorney for one party, challenged the award and admitted that he had learned about facts that might tend to prejudice the arbitrators *at the time of the first hearing*. Judge Leibel in denying the application to set aside the award stated specifically that where a party has knowledge of some bias or prejudice on the part of an arbitrator or facts possibly indicating such bias or prejudice, "he cannot remain silent", go ahead with the hearings and "then later object to the decision * * *".

In June 1969 in a case decided some seven months after the decision in *Commonwealth*, the New York State Appellate Division First Department in *Cushlin v. Bialer*, 32 App. Div. 2nd 217, 301 N. Y. Supp. 2d 181, pointed out, that parties to an agreement were always at liberty to adopt their own method of selecting arbitrators and that Courts must enforce the agreement of the parties.

In *American Silk M Corp. v. Meinhart*, AD , 315 N. Y. Supp. 2d 144 (November 1970), the New York State Appellate Division First Department held:

> "The right to arbitrate in commercial matters depends upon the agreement of the parties, *and it is clear that the parties may engraft conditions thereupon or limit such right*". Emphasis supplied.

In the case at bar not only did the Constitution of the New York Stock Exchange, to which petitioner had subscribed since 1950 when it had become a member firm of the Exchange, mandate arbitration between its members, but the agreement between the parties provided for arbitration before a Panel of Arbitrators of the New York Stock Exchange in accordance with its Constitution and Rules.

Both of the parties hereto by agreeing to be bound by the arbitration proceedings of the Exchange Constitution

and then further binding themselves to the same effect by the partnership agreement must have known that in the ordinary course of business of the Exchange the arbitrators before whom any arbitration would proceed, or their respective firms, would have had to conduct Exchange business with either or both of the parties to any arbitration.

At page 11 of its petition, petitioner refers to the Securities Exchange Act of 1934. A reading of the Act would show that it specifically provides

> "28(b) Nothing in this title shall be construed to modify existing law (1) with regard to the binding effect on any member of any exchange *of any action taken by the authorities of such exchange to settle disputes between its members*, or (2) with regard to the binding effect of such action on any person who has agreed to be bound thereby * * *" Emphasis supplied. 15 U. S. C. Sec. 78bb(b).

The cases cited by petitioner in Points I, II and III are not relevant to the situation in the case at bar. No one disputes that the Exchange's activities must be carried out in accordance with the highest ethical standards (*Silver* v. *New York Stock Exchange*, 373 U. S. 341), or that contracts are controlled by the law in force when they are made (*People ex rel. City of N. Y.* v. *Nixon*, 229 N. Y. 357), or that rights may not be waived if they contravene public policy (*Brooklyn Savings Bank* v. *O'Neill*, 324 U. S. 697). However the holdings in these cases have nothing to do with the issue in the instant case.

The Court of Appeals in the case at bar rightly held that if petitioner's views were to prevail disputes involving larger or specialized firms would be routinely remitted to the Courts (19a).

Even if we assume arguendo that this award were vacated, it would be an exercise in futility. The parties would then have to arbitrate their differences before another Panel of the same Arbitration Board of the Exchange, and the same objections could be raised by petitioner (R29a).

CONCLUSION

The petition is without merit and should be dismissed with costs.

Respectfully submitted,

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January 4, 1971.